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OFFICE OF NATIONAL RECOVERY ADMINISTRATION

APR 8 1936

DIVISION OF REVIEW

TWO STUDIES OF CERTAIN CONSTITUTIONAL POWERS AS POSSIBLE BASES FOR FEDERAL REGULATION OF EMPLOYER-EMPLOYEE RELATIONSHIPS

(a) WAR POWER AND CHILD LABOR

(b) POST OFFICES AND POST ROAD POWER

By

Victor E. Cappa

WORK MATERIALS NO. 68

LEGAL RESEARCH SECTION
MARCH, 1936

OFFICE OF NATIONAL RECOVERY ADMINISTRATION

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9809

F O R E W O R D

These "two studies of Certain Constitutional Powers as Possible Bases for Federal Regulation of Employer-Employee Relationships" were prepared by Mr. Victor E. Cappa of the Legal Research Section, Mr. George W. Kretzinger, Jr., in charge.

It did not prove possible to make available for these studies the amount of time or personnel that was originally contemplated. They have, however, been carried to a stage that justifies making them available in mimeographed form.

The reader will be interested in certain other analyses which have appeared in mimeograph form, such as:

Work Materials No. 21 - The Possibility of Variations in Tariff Rates to Secure Proper Standards of Wages and Hours -

Work Materials No. 24 - The Treaty-Making Power of the United States -

Work Materials No. 25 - Federal Regulation Through the Joint Employment of the Power of Taxation and the Spending Power -

Work Materials No. 26 - Possibility of Government Contract Provisions as a Means of Establishing Economic Standards -

Work Materials No. 29 - State Recovery Legislation in Aid of Federal Recovery Legislation -- History and Analysis -

At the back of the report will be found a brief statement of the studies undertaken by the Division of Review.

L. C. Marshall
Director, Division of Review

March 16, 1936

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OFFICE OF NATIONAL RECOVERY ADMINISTRATION

DIVISION OF REVIEW

WAR POWER AND CHILD LABOR

Would the War Power of the Federal Government Sustain Legislation Regulating Child Labor or Hours of Labor in the Various Industries of the Country?

LEGAL RESEARCH SECTION
MARCH, 1936

9809

QUESTION

Would the war power of the federal government sustain legislation regulating child labor or hours of labor in the various industries of the country:

Applicable Articles of The United States Constitution

Article I, Section 8:

"The Congress shall have power:

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer terms than Two Years;

"To provide and maintain a Navy;

"To make Rules for the Government and Regulation of the land and naval Forces;

"To provide for calling forth the Milita to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

OPINION

It is thought that the direct relationship assumed by our hypothetical question to exist between child labor, or unduly long hours

of labor and the maintenance of an adequate supply of able-bodied men for military purposes may justify peace time legislation to regulate matters which by virtue of authoritative judicial pronouncement have been considered an integral part of the residuary powers confirmed to the states by the Tenth Amendment. (Hammer v. Dagenhart, 247 U. S. 251; Bailey v. Drexel Furniture Co., 259 U. S. 29).

The theory is that such power is part of the quantum of sovereignty exercised by the English Crown in times of peace and surrendered by the states who inherited that sovereignty to the federal government on the adoption of the Constitution.

The "pivotal inquiry" is, of course, the extent of the peace time power of the English sovereign as the result of our researches on this point may at the outset dispose of the whole question. If the power is found to have existed, it then becomes necessary to determine whether it was transferred to the colonies and by the successor states to the federal government without limitation of any kind. In order that our inquiry be not considered a frivolous one, we must necessarily assume arguendo the strongest factual case for the effect of these later practices on the citizens military capacity and indeed it would appear that such a case has already been made out (See Brief for Defendant in Error - Bunting v. Oregon, vol. 14, Case no. 38 Transcripts of Records and File Copies of Briefs, U. S. Supreme Court, 1916 at pages 572 to 604b).

The mediaeval precedents establish that the king being entrusted with the defense of the country could commit in time of war all sorts of trespasses upon private property such as the taking of ships, money, men for the defense of the country. It was not until 1634, however, that Attorney General Noy's writs extended the old precedents by predicating the kings demand not in actual but on apprehended danger and sought to justify the extension by the principle that prevention was better than cure. Holdsworth (A History of English Law, Vol. 6, page 51) states: "it is perhaps arguable that there is some authority for this view in the case of The Kings Prerogative in Saltpetre (1607) 12 Co. Rep. 12) - at any rate this seems to have been the opinion of the Court of Appeal in 1915." The opinion referred to is found in re a Petition of Right C1915 T 3 K. B. 649. Lord Cozens - Hardy M. R. seemed to be of the opinion that the argument for Hampden in the famous ship-money case (discussed, infra) confined the discretion of the crown within dangerously narrow limits. In dealing with the king's powers to enter on land in case of invasion, he said: "the existence of the prerogative was not distinctly challenged by counsel for the suppliants, but they sought to limit it to a case of actual invasion rendering immediate action necessary. In my opinion there is no foundation for this limitation of the prerogative. To postpone action until the enemy has landed, or until the authorities are satisfied that a landing in a particu-

lar neighborhood is imminent, would or might be fatal to the security of the realm." Holdsworth (op. cit. at p. 54) says that "this dictum is consistent with the views of the Court in the Case of Ship Money rather than with the views of those who argued for Hampden and its correctness is therefore open to doubt" and that "it is because the prerogative is so limited by common law that comprehensive Defense of the Realm Legislation is necessary".

The ship levies aroused great opposition and the right to make the same was contested in the courts. The Crown's contentions prevailed in Darnel's Cases (1627) 3 S. T. 1; Bates Case (1606) 2 S. T. 371 and Hampden's Case (1637) 3 S. T. 825, wherein it was held that the king had large discretionary powers to imprison dangerous persons, to regulate trade and to act as he pleased to secure the safety of the country. The Case of Proclamation (1611) 12 Co. Rep. 74, decided against the kind was ignored while the favorable decisions were extended beyond all bounds to support the system of prerogative rule (Holdsworth, op. at p. 54).

In the famous Hampden Case (which the King in 1637, relying on the opinion of the judges in favor of its legality, allowed to be argued in the courts), the argument for Hampden was the distinction drawn between the case of a time of actually present danger and the case of a merely apprehended danger. It was admitted that in the case of actually present danger, such as invasion, the King can act as he pleases. But the country must be actually in danger, and the King's allegation that the country is in danger cannot give rise to the power. The Crown argued that the same principle must apply in the case of apprehended danger or measures for the preservation of the state may be too late. The King is the sole judge as to the existence of danger. The extent of the discretionary power claimed for the King was allowed by the court. Holdsworth (op. cit. p. 53) criticizes the decision as making the King the sovereign power in the constitution though he voices the opinion that the argument for Hampden confined to discretion of the Crown within dangerously narrow limits.

As Holdsworth (A History of the English Law, Vol. 6, p. 30) points out, the uncertainty of English public law and the great obscurity which hung around the extent of many branches of the prerogative make it difficult to say whether the discretionary power claimed by the English monarchs was contrary to law or not, but that in any event, it was exercised not in order to increase the effectiveness of the executive, but in order to render him absolute.

In America it would seem that there are no precedents for prerogative rule by the independent states, probably due to the short interval between independence and the creation of the federal government, first under the Articles of Confederation and then under the Constitution. While under the Articles, the only element of the war power conceded to the central government was "to build and

equip a navy" (for its land forces it was obliged to rely wholly upon requisitions made upon the states) it does not appear that the sovereignty thus reserved by the states was ever expressed in any of the prerogative forms attempted by the English Monarchs. If such had been the fact, doubtlessly a similar resistance thereto would have been encountered.

Moreover, the spirit of the peculiar American constitutional system of apportionment of sovereign powers between the dual governments is contrary to the theory of the existence of any such prerogative power. The framers had in mind the traditional abuses of the alleged royal prerogatives in time of peace and they legislated to the end of denying the existence of the prerogatives in either the federal government or the states. Amendment III provides that "no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law". This limitation is applicable to both sovereigns. Article I, Section X, Clause 3, prohibits the states from laying "any duty of tonnage in time of peace" as well as the keeping of ships of war in time of peace or engaging in war, etc.

The case for prerogative peace time rule being as weak as it is, it seems only too evident that it could never overcome the additional limitation on the central government, implied though it be, which is the unique characteristic of our governmental form, viz., the Tenth Amendment (newly revitalized). If the war power were given the limitless construction contended for, the inevitable result would be the destruction of the dual form. Universal involuntary military training or conscription, the abolition of the liquor traffic, etc., could be accomplished through federal legislation. Indeed, it may be possible to make out a much stronger factual and scientific case for the abolition of the liquor traffic under the war power than for the elimination of child labor, as conceivably the effects the use of liquor (moderate or immoderate) on the citizen's military usefulness, are more direct than those of child labor. The War Prohibition Act sustained by the Supreme Court in Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 64 L. Ed. 194 (1919), although not a precedent for peace times, recognized this relationship in war times.

The theory presently much in vogue that regulatory legislation directed to evils in restricted industries and areas would overcome the objections of the Supreme Court to the type of comprehensive regulatory legislation which it has consistently stricken down in the past two years, appears to be predicated on the fallacy that degree rather than legal principle conditions the functioning of the judicial process.

Analogies to the broad interpretations given in the past to the commerce power (Stafford v. Wallace, 258 U. S. 495; Chicago Board of Trade v. Olsen, 262 U. S. 1; Minnesota Rate Cases, 230 U. S. 352) which have permitted the federal government to regulate

local matters burdensome or obstructive to interstate commerce are unavailing, as the Supreme Court has in its recent decisions on new deal legislation, particularly in the Schechter Case, demonstrated that it will not further extend the principles of these cases to the extent of obliterating the reserved powers of the states. Such would be the effect of the proposed interpretation of the war power.

There is a body of law in this country relating to the war time powers of the government. These cases make it clear that in times of war the federal government does possess certain powers which, while theoretically subject to the inhibitions of the Constitution are practically in the nature of prerogative rule which overrides the police power of the states. However, they are emphatic in the statement that these powers exist only during the existence of war, or for such a period thereafter as may be necessary to demobilize the armed forces and industries of the country. It appears never to have been thought that these powers existed in times of peace preceding a war. National Defense Acts like the one enacted in the emergency of 1916 afford no precedent for the proposed effect, as the effect of these is simply to quicken.

During the World War, the Congress passed as war measures such legislation as the War Prohibition Act, the National Prohibition Act, the Selective Draft Law, acts regulating the conduct of civilian individuals within military zones, disorderly houses and the sales of liquor within these zones, the sale of fuel and the necessities of life, and providing for the taking over and control of the transportation systems and telegraph lines. The War Labor Policies Board on July 19, 1918, adopted a resolution prohibiting the use of child labor on all work done pursuant to government contract, thus nullifying in part the effect of the decision of the Supreme Court in Hammer v. Dagenhart, supra, decided June 3, 1918, which invalidated a congressional prohibition in interstate commerce of child labor products. The National War Labor Conference Board recommended and President Wilson approved that the right of employees to organize in trade unions should not be denied and that employers should not discharge workers for membership in trade unions. This nullified the decisions of the Supreme Court in Coppage v. Kansas, 236 U. S. 1, and Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, which had invalidated laws prohibiting the use of "yellow dog contracts" by employers.

The regulation of all these matters, particularly the sale of intoxicating liquors, was ordinarily within the domaine of the state as part of the police power reserved to it by the Tenth Amendment. In Hannah & Hogg v. Clyne, 263 F. 599, the war time prohibition acts were held unconstitutional. In so doing, the court said at pages 603 to 607:

> "In times of peace Congress has no police power of any kind, at any time, anywhere, except over territory which is peculiarly within its juris-

diction, such as the District of Columbia, Alaska, army posts, and other places used solely for governmental purposes. Generally, as a proposition of law, Congress had no power to regulate the selling of intoxicating liquors, much less to restrict or prohibit their disposition within the confines of the several states. In Hammer, United States Attorney, v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E, 724 (decided June 3, 1918), there came before the Supreme Court of the United States an act of Congress prohibiting transportation in interstate commerce of goods made at a factory in which children under 14 had been permitted to work, or where those between 14 and 16 years of age had worked more than 8 hours in any one day. The bill was filed against the district attorney to enjoin him from enforcing the law, which for the first offense fixed a fine of not more than $200, and for subsequent offenses of not less than $100 nor more than $1,000, or by imprisonment for not less than 3 months, or both. The court held the act unconstitutional, and sustained the injunction, which enjoined the United States attorney from enforcing it, saying:

"'The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government.'

"It would be but a waste of time to cite further authority on this point. The constitution (article 1, S 8) provides as follows:

"Clause 1: 'Congress shall have power:'
"Clause 11: 'To declare war.'
"Clause 12: 'To raise and support armies.'
"Clause 13: 'To provide and maintain a navy.'
"Clause 14: 'To make rules for the government and regulation of the land and naval forces.'
"Clause 18: 'To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.'

"Congress was empowered, under section 8, to enact any law which it deemed necessary or proper to insure a successful termination of the war with Germany and its allies. Under that power acts were passed regulating the conduct of civilian individuals within military

zones; disorderly houses and the sale of liquor were prohibited within those zones; the Selective Draft Law was passed; the taking over and control of the transportation systems and telegraph lines; the regulation of fuel and the necessities of life. In other words, the grant to Congress of the power to raise and support armies, considered in conjunction with the power to declare war, to make rules for the government and regulation of the land and naval forces, and to make all laws necessary and proper for the execution of the granted powers to commensurate with the emergency, and conferred upon Congress the right to do many things which in times of peace it could not have done. McKinley v. United States, 249 U. S. 397, 39 Sup. Ct. 324, 63 L. Ed. 668.

"A reading of the authorities and the history of the Constitution must lead one to the conclusion that Congress had the power, in time of war, to enact legislation which could check or curb, or limit or restrict, or prevent altogether, the sale of intoxicating liquors, and that in time of peace Congress had and has no such power.

"The power - the incidental power it may be called - of Congress, granted by clause 18 of section 8, so far as it relates to this case, must be liberally construed to meet every emergency or contingency definitely related to the carrying on of the war. The exercise of that power should be tested by the one question: Is what was done in the interest of the general welfare of this country and its people?

* * * * * * * * * * *

"Conceding, as we must, that Congress, aiming toward a successful termination of the war, had the right and power to enact a police regulation for the general welfare of all the people, the courts may not substitute their judgment for that of the legislative body as to the existence of the emergency for, or the propriety of, the legislation to that end.

"'But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative

branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.' Mugler v. Kansas, 123 U. S. 623, at page 660, 8 Sup. Ct. 273, at page 296 (31 L. Ed. 205).

"It is only when under the cloak of the police power the legislative body does not act in the general welfare, but proceeds arbitrarily to regulate or prohibit a trade, business, or vocation, otherwise recognized as lawful in the community, that the courts may interfere.

"'It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the power of the courts to declare such regulation invalid will be exercised with the utmost caution, and only where it is clear that the ordinance or law declared void passes the limits of the police powers, and infringes upon rights guaranteed by the Constitution.' Dobbins v. Los Angeles, 195 U. S. 223, at page 238, 25 Sup. Ct. 18, at page 21 (49 L. Ed. 169)."

The court rejected the contention that the war power of Congress expired the moment there had been a cessation of actual combat, but held that it continued until there had been a demobilization of the armed forces and of industry.

In Hood Rubber Co. v. Davis, 151 N. E. 119, 255 Mass. 200, Executive Orders by the President of the United States issued in October 30, November 5 and November 12, 1919, which purported to revise orders formerly issued during the World War under the provisions of the Lever Act, 40 U. S. Stats. at Large 276, were held without warrant in law and to furnish no defense to an action against the Director General of Railroads under the Transportion Act (41 U. S. Stat. at Large 461) by the owner and consignee of coal which was delivered to the defendant between October 30, 1919 and February 16, 1920 and was confiscated by him under authority which he assumed was conferred on him by such orders. In holding that the restoration order of October 30, 1919 could be issued only if a state of war continued, the court said at pages 204 and 205:

"The Lever Act conferred upon the President certain powers to regulate the prices and distribution of fuel, to be exercised for the efficient prosecution of the war. Under section 25 of the act the restoration order of October 30 could be issued only if a state of war continued, and the order was issued as a war measure. On January 31, 1919, shortly after

> the Armistice, substantially all regulations as to prices and distribution of coal were suspended and the Administrator ceased to function. The restoration of the former order on October 30, 1919, in anticipation of a strike in both hard and soft coal mines, and the delegation of power to the Director General of Railroads to divert coal upon the railroads as might seem necessary in the then present emergency to provide for the requirements of the country, were not in any way connected with the war; they affected but a part of the community, and the use of a commodity which the government has not attempted to regulate. The executive orders of the President issued October 30, November 5, and November 12, 1919, were not within the power conferred upon the President by the Lever Act. . . ."

The Hood Rubber Company Case is in every material particular on all fours with the decision of the Supreme Court in Davis v.Newton Coal Co., 267 U. S. 292, affirming 281 Pa. 74, 126 A. 192. In this case the plaintiff's coal was commandeered by the Director General of Railroads (acting under the same orders of the Fuel Administrator as were involved in the Hood Case) who sought to pay the plaintiff the prices fixed by the Fuel Administrator in the orders which were the same as the prices named in plaintiff's contracts. It was held, however, that the plaintiff was entitled to be paid the difference between the prices it paid to its vendors and the market value which was higher. The court thus impliedly recognized the invalidity of the post war orders, and it affirmed the decision of the Supreme Court in Pennsylvania which held that the war with Germany had ceased prior to October 30,1919, and that the purpose of the President's order then issued was to meet an emergency incident to the miners' strike - not to provide for the efficient prosecution of the war.

In Public Service Commission of the State of New York v. New York Central Railraod Co., 185 N. Y. S. 267, 193 App. Div. 615, affd. 129 N. E. 455, 230 N. Y. 149, the question involved was whether an order of the State Public Service Commission directing the railroad company to restore a two cents a mile passenger rate which had been superseded by a three cents a mile rate fixed by federal legislation under the war power (Federal Transportation Act of 1920). It was held that the war power began and ended with the necessities created by the war, and that it did not include the power to legislate in matters belonging of right under the Tenth Amendment to the states such as the intrastate regulation of common carriers. In holding the order of the State Public Service Commission to be paramount, the New York Court of Appeals said at pages 152-155:

> "On December 28, 1917, under authority of an act of Congress the President entered into 'possession, use, control and operation' of the New York Central Railroad and later fixed a rate of fare upon that

road, for all passengers, at three cents a mile. This action was not justified by any of the ordinary rules of law. It can be sustained solely as the exercise of the war powers of the United States. And these powers are not limited by these ordinary rules. They are not bounded by any specific grant of authority. They are not unlike what in the states we call the police power, but the police power raised to the highest degree. They are such powers as are essential to preserve the very life of the nation itself. When requisite to this end the liberty of the citizen - the protection of private property - the peace-time rights of the states must all yield to necessity.

"That the Federal Control Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. §§ 3115 3/4a-3115 3/4p) was a proper exercise of these powers - that as incident to the control of the roads, the question of fares intra- as well as inter-state was lodged exclusively in the president - has been held by the Supreme Court. Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. The owners, however, did not lose their property. Their rights over it were suspended. And so as to the states. Any regulations they might have made as to the operation of the roads, any powers they possessed over intrastate traffic, any contract obligations vested in them, were merely suspended while the general government was in possession.

"The time came when the necessity - the basis of the war power - ceased. The roads were to be returned to their owners; the states were once more to exercise their accustomed authority. Yet the process of readjustment was complex. And the power to seize the roads carried with it such reasonable power as was needed to bring about that readjustment in an orderly and equitable manner. The government had operated competing roads as part of one system. It has distributed cars as its needs required. It had increased the wages of employees. It had fixed the rates of fare both interstate and intrastate. The public good required that the normal state of affairs should be re-established with the least possible disturbance. Congress was well within its rights, therefore, when it provided that the tariffs in force on February 29, 1920, should continue until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, and in no case should be reduced before September 1, 1920, without the approval of the Interstate Commerce Commission.

"Obviously the purpose of this clause, so far as the states were concerned was to maintain fares until September 1st and thereafter until, in view of possible new conditions, affirmative action was taken by the state authorities. The thought was that in many instances local rates had been fixed by local commissions with a view to costs and earnings as they existed prior to 1917. Let them act if they desired to restore the old rates. It is equally obvious that when such action was taken is immaterial, if the actual reduction did not take effect until September 1st. In a case like that of the defendant, where the rate is a condition of the charter, or in a case where the rate is fixed by statute, there would seem to be less purpose in such a provision. Possibly it seemed wise in all cases to give the roads formal warning of reversion to the old state of affairs and an opportunity to make and file the necessary tariff schedules. In any event, Congress made no exception to the general rule.

"Therefore the New York Central Railroad Company might continue existing rates until some change was required by the state of federal authorities or pursuant to authority of law, or, as we construe the language as it affects New York, by the action of the Interstate Commerce Commission, or the Public Service Commission, within the limits of their respective powers, or by the action of somebody having jurisdiction over the railroad and the subject-matter of rates. Such action, however, has now been taken. As we have said, the obligation of the defendant to carry way passengers for two cents a mile has not been destroyed. It was temporarily suspended. It was always subject to this possibility under the war power, if it became necessary. But when the suspension ceases, it revives with all its original force. The suspension does cease, in the language of the statute, when the three-cent rate is 'changed by state authority.' That authority over intrastate rates is the Public Service Commission. Any charge made by a public service corporation in excess of that allowed by law is prohibited. Public Service Commissions Law (Consol. Laws, c. 48) § 26. And if the commissioners shall after a hearing be of the opinion that any fare demanded is in violation of any provisions of law, it may determine the proper fare to be thereafter charged. Section 49. This is precisely what the Commission has done. True, the defendant hitherto was authorized to charge three cents a mile for local fares between Albany and Buffalo. In a sense

that far 'was allowed by law'; but the law our statute refers to is our law still in existence, having all its ancient force when the war powers of the United States cease. And they do cease when our Commission acts."

CONCLUSION

The writer of this memorandum is of the opinion that the war power of the Federal Government would not sustain legislation regulating child labor or hours of labor in the various industries of the country.

OFFICE OF NATIONAL RECOVERY ADMINISTRATION

DIVISION OF REVIEW

POST OFFICES AND POST ROAD POWER

Memorandum of Law Concerning the Authority of Congress to Utilize Its Constitutional Power to Establish Post Offices and Post Roads as a Basis for Legislation Prohibiting Use of the Mails or of Post Roads to Employers or Industrial Units Which Fail to Comply with Federal Minimum Wage, Maximum Hours of Labor, or Fair Trade Practice Standards

LEGAL RESEARCH SECTION
MARCH, 1936

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MEMORANDUM OF LAW CONCERNING THE AUTHORITY OF CONGRESS TO UTILIZE ITS CONSTITUTIONAL POWER "TO ESTABLISH POST OFFICES AND POST ROADS" AS A BASIS FOR LEGISLATION PROHIBITING USE OF THE MAILS OR OF POST ROADS TO EMPLOYERS OR INDUSTRIAL UNITS WHICH FAIL TO COMPLY WITH FEDERAL MINIMUM WAGE, MAXIMUM HOURS OF LABOR, OR FAIR TRADE PRACTICE STANDARDS

Question

Can Congress utilize the power granted to it by Article I, Section 8, Clause 7 of the Federal Constitution "to establish post offices and post roads" as a basis for legislation prohibiting use of the mails or of post roads to employers or industrial units which fail to comply with federal minimum wage, maximum hours of labor, or fair trade practice standards?

Opinion

I. Historical Foreword.

A review of the records of the Constitutional Convention fails to disclose any considerable discussion in regard to Article I, Section 8, Clause 7 which provides that Congress shall have the power to establish post offices and post roads. The report of the Committee on Style of the Constitutional Convention shows provisions reading "to establish post offices and post roads" (Records of Federal Convention, Farrand, Vol. 2, p. 595). The Journal of Thursday, August 16, 1787 shows that the words "and post roads" were added to the words appearing in the Constitution as first proposed (Records of Federal Convention, Farrand, Vol. 2, pp. 303-304 and 569) and the Constitution as finally adopted by the Convention on September 17, 1787 empowered Congress to establish both post offices and post roads. (Records of Federal Convention, Farrand, Vol. 2, p. 655).

The power was regarded as a harmless one as appears from the following comment in the Federalist No. XLII:

> "The power of establishing post roads must, in every view be a harmless power; and may, perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the states can be deemed unworthy of the public care."

Perhaps for this reason no great pains appear to have been taken to express clearly the object of the power. As Pomeroy on Constitutional Law, Section 411, states:

> "No other constitutional grant seems to be clothed in words which so poorly express its object, or so feebly indicate the particular measures which may be adopted to carry out its design. To establish post offices and post roads is the form of the grant; to create and regulate the entire postal system of the country, is the extent indicated."

One of the first judicial references, if not the first, to the power is that found in McCulloch v. Maryland, 4 Wheat. 316, (1819), where Chief Justice Marshall in explaining the theory of implied powers used the postal power as a convenient illustration. Thus at page 417 he said:

> "Take, for example, the power 'to establish post-offices and post roads.' This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment."

The historical development of the power from a mere governmental monopoly of the right to carry the mails to one which has supported many regulatory measures (with more than incidental effect on purely local activities) has come about (similarly to the development of other constitutional powers) through the application of the general principle that the extent of the delegated powers is not to be determined by the necessities of the powers at the time the constitution was adopted but by the exigencies of future contingencies. The best statements of this principle are doubtlessly those found in The Federalist No. XXXIV, in McCulloch v. Maryland, 4 Wheat, 316, 415 and in Pensacola Telegraph Co. v. Union Telegraph Co., 96 U.S. 1, 24 L. Ed. 708. Hamilton writing in The Federalist (supra), in discussing another provision of the Constitution said:

> "...we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity ... Nothing, therefore, can be more fallacious, than to infer the extent of any power proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a capacity to provide for future contingencies, as they may happen; and as they are illimitable in their nature, so it is impossible safely to limit that capacity."

In McCulloch v. Maryland, supra, Chief Justice Marshall (also discussing another provision) said at page 415:

> " ... This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers,

would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. ..."

In Pensacola Telegraph Co. v. Union Telegraph Co., supra, the Supreme Court in discussing this very power said (p. 9):

"The powers thus granted are not confined to the instrumentalities ... or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."

Aside from the grant of this power, it would seem that Congress would have had the power to control the mails between the states at least, as incidental to the regulation of commerce. In Pensacola Telegraph Co. v. Union Telegraph Co., supra, it was held that the transmission of telegraphic messages was not only an operation under the power to establish post roads but was commerce and as such, when interstate, subject to congressional regulation.

The development of this power can be more adequately traced under the subsequent headings hereof as it is inextricably interwoven with such great constitutional questions as the reserved power of the states under the tenth amendment, the right of the people to be secure in their papers against unreasonable searches and seizures, the freedom of the press, etc.

II. The Nature of the Power.

One of the early views of the power was that by this grant Congress was given the power only to designate the routes over which the mails should be carried and the post offices where they should be received and distributed and that it did not provide the authority to construct and operate agencies for the carrying and distributing of mails. Vol. 2, Willoughby on The Constitution of the United States, 1102. President Monroe wrote to Congress in connection with his veto of May 4, 1822 of the Cumberland Road Bill as follows:

"We are satisfied that all of them (a number of our enlightened citizens) would answer that a power was given thereby to Congress to fix on the towns, courthouses and other places, through our Union, at which there should be post offices; the routes by which the mails should be carried from one post office to another, so as to diffuse intelligence as extensively, and to make the institution as useful as possible; to fix the postage to be paid on every letter and packet thus carried to support the establishment; and to protect the post offices and mails from robbery, by punishing those who should commit the offense. The idea of the right to lay off the roads of the United States on a general scale of improvement, to take the soil from the proprietor by force; to establish turnpikes and tolls, and to punish offenders in the manner stated above would never occur to any such person. The use of the existing road,

> by the stage, mail carrier, or post-boy, in passing over it, as others do, is all that would be thought of; the jurisdiction and soil remaining to the State, with a right in the State, or there authorized by its legislature, to change the road at pleasure."

See also 4 Elliot's Debates 279, 283 and 354 for the same view.

The view opposed to this was that the power was not exhausted by these modes of exercising the power and that it comprehended the right to make or construct any roads which Congress might deem proper for the conveyance of the mail and to keep them in due repair for such purpose. In his Commentaries On The Constitution (2nd ed.) Chap. XVIII, Story argued persuasively for this second or liberal interpretation.

The broader view has been sustained by the courts. In the case of Ex Parte Jackson, 96 U.S. 727, a restricted interpretation was definitely rejected. In upholding the right of Congress to exclude from the mails letters or circulars concerning illegal lotteries, the court approved a liberal view. Thus the court said at page 732:

> "The power vested in Congress 'to establish post-offices and post-roads' has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. ..."

In California v. Central Pacific R. R. Co., 127 U.S. 1, 32 L. Ed. 150, the power of Congress to construct or to authorize individuals to construct railroads across the States and Territories was involved. This power the Supreme Court held was implied not only in the power to regulate commerce but in the power to provide for postal accomodations and military exigencies.

Moreover, the courts since have recognized broader limits than even Story contended for, though the full extent of the power may not be known until the Supreme Court passes on recent New Deal legislation wherein a much more comprehensive use thereof than before known to the law is contemplated.

Logically, the next inquiry after that relating to the extent of the power is whether it is an exclusive power or is concurrent in the states. Story, supra, sec. 1150, did not regard this as an important inquiry because it was admitted on all sides that even if it were concurrent in the state, it could be exercised only in subordination to the power of Congress. According to one commentator cited by him (I Tuck Black Comm. App. 265) the power was concurrent though subordinate and a state might therefore establish a post road or post office on any route where Congress had not established any, but according to another commentator (Rawle on the Constitution, Ch. 9, p. 103, 104) the power was exclusive in Congress.

Undoubtedly the federal government may monopolize for itself the business of carrying mail matter, for, in all countries this monopolization has been practiced by governments. Willoughby, supra, section 65). Thus in United States v. Hochsmerger, 26 Fed. Cas. 803 (1860), the court said:

> "No government has ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mailable packets."

The mere existence of a governmental postal system, however, does not imply the existence of a governmental monopoly, as the court pointed out, but that exists only when there is statutory provision to that effect, which provision has been made in the United States and is now found in Sections 179 to 188 of the Penal Code of the United States. (18 U.S.C.A. secs. 301-311).

Thus Section 179 of the Criminal Code (18 U.S.C .A.302) provides that "whoever, without authority from the Postmaster General shall set up or profess to keep any office or place of business bearing the sign, name, or title of post office, shall be fined not more than $500." Section 181 of the Criminal Code (18 U.S.C.A.304) provides that "whoever shall establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place, to any other city, town, or place, between which the mail is regularly carried, or whoever shall aid or assist therein shall be fined not more than $500. or imprisonment not more than six months or both." Section 183 of the Criminal Code (18 U.S.C.A.306) provides that "whoever shall transmit by private express or other unlawful means, or deliver to any agent thereof, or deposit or cause to be deposited at any appointed place, for the purpose of being so transmitted, any letter or packet, shall be fined not more than $50."

These Sections and others in pari materia prohibiting the establishing of private expresses have been upheld. United States v. Thompson, (D.C.Mass. 1846) 28 Fed. Cas. No. 16,489, United States v. Easson, 18 F. 590, Blackham v. Gresham, 16 F.609, 21 Op. Atty. Gen. 394, 4 Op. Atty. Gen. 159.

The case of United States v. Easson, supra, involved the ownership and management by a private person for his private benefit and profit and not as a branch of the public service of a private express. The defendant's business was to employ a corps of messengers for the purpose of going about the City of New York to the stores and offices of all his customers, collecting letters daily, generally two or three times a day, for delivery anywhere between the Battery and Harlem. Stamps similar to postage stamps were furnished and sold to such customers beforehand, which, on being affixed to the letters, entitled them to delivery by the defendant according to the course of his business which was to bring all the letters thus collected to his office, then to send them out into packages, to make up convenient routes for delivery, to dispatch the letters by messengers sent out for that purpose who took

on their routes the letters of all the persons whose letters had been brought to the central office. The defendant was held to be violating Section 181 of the Criminal Code.

While not expressly applicable to the states, the use of the general pronoun "whoever" throughout these Sections would indicate the existence of an all comprehensive congressional intent, which, even if it were not to be construed as comprehending the states would certainly operate on any individual employee of the state engaged in the conduct of postal operations, as no exceptions are made in favor of such employees. Thus the Sections apply to any "owner, driver, conductor, master or other person having charge of a conveyance of any kind used to carry letters and packets" (18 U.S.C.A. 307) and even to the transmitter by private express of "letters and packets". (18 U.S. C.A. 306). The obvious intent is to eliminate competition from all sources in conflict with the federal postal system.

It is thus difficult to understand the suggestion by Willoughby, supra, Section 654, that it would appear from the case of Ex Parte Jackson, 96 U.S. 727 (1878) that the states "may permit, or themselves provide for the carrying of letters or merchandise in other ways, as for instance, by express companies and this too with reference to materials excluded by Congress from the mails as immoral, fraudulent or otherwise objectionable", though not for matter treasonable to the United States.

This view probably is based on a certain dictum of the court at page 735. After calling attention to the fact that in 1836 the question of the power of Congress to exclude certain publications from the mails had been discussed in the Senate and that the prevailing view had been that Congress had not this power the court continued at page 735:

> "Great reliance is placed by the petitioner upon these views, coming, as they did in many instances, from men alike distinguished as jurists and statesmen. But it is evident that they were founded upon the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal-routes in any other way than by mail; and of course it would follow, that if, with such a prohibition, the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed, and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend."

In our opinion this dictum stands for nothing more than the

proposition that while Congress may exclude certain materials and merchandise other than letters or packets from the mails, it may not prevent the transportation of the same in other ways. The dictum, however, does not touch on the right of Congress to prevent the transportation in other ways, whether by state postal systems or by private expresses of "letters and packets", and certainly Congress in Sections 179 to 188 of the Criminal Code of the United States (18 U.S.C.A. sec. 301-311) has legislated on the assumption that it had such power. Furthermore the language of the Supreme Court in Ex Parte Rapier, 143 U.S. 110, 36 L. Ed. 93 (1892), clearly indicates that there has been a surrender by the states to the Congress of the power to establish post offices and post roads. The Court said at page 134:

> "The states before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective...."

In any event if any state were to attempt to establish a postal system or private express to carry letters and packets, the citizens of the state who attempted to use it might run the risk of a criminal prosecution under 18 U.S.C.A. 306. The question is merely academic, however, as no state has ever attempted the exercise of the postal power; and as Story said (supra, page 79):

> "It is highly improbable that any state will attempt any exercise of the power, considering the difficulty of carrying it into effect without the cooperation of Congress".

It is thus a safe conclusion that the power is in principle and practice an exclusive power of Congress.

III. The Right To Exclude From the Use of The Mails.

This right is subject to general constitutional prohibitions. Willoughby (Vol. 2, The Constitution of The United States, p. 1105, 1106; 1929 ed.) discusses the subject as follows:

> "... In general it may be said that exclusion from the mails is more easily defended, and, perhaps, is more extensive than it is in the case of interstate commerce, unless it be held, as has not yet been expressly and explicity held, that the very right to engage in interstate commerce is a distinctively Federal right, that is, that it is of Federal origin and creation, and, therefore, may be granted or withheld upon such conditions as Congress may see fit to impose. The author is not acquainted with a case in which it has been held, in explicit terms, that the right to send or receive matter in or through the mails

owes its existence to Federal law, but it is certain that, if such a right were to be deemed one existing independently of Federal action, it would be an absolutely empty and purely abstract one were it not for the postal facilities supplied and operated by the Federal Government. From the fact that, as regards the mails, the facilities for their transmission are exclusively supplied by the Federal Government itself, which is not the case with reference to interstate commerce, it might be argued that Congress may determine in a more arbitrary manner what shall and shall not be carried in the mails than it constitutionally can with regard to interstate commerce which it regulates rather than creates the right to engage in, and the instrumentalities for the carrying on of which it does not supply or operate.

"However, in any case, it would seem that Congress, in exercising whatever power it may possess to exclude matter from the mails, is limited by those general
"... limitations and prohibitions which, by the Federal Constitution, are placed upon the exercise of its enumerated powers by Congress. And thus there have arisen numerous cases in which there has been raised the question whether an exclusion from the mails, including the means provided for enforcing that exclusion, have not violated the prohibitions of the Constitution with reference to the denial of due process of law, the abridgement of freedom of speech and the press, the prohibition of unreasonable searches and seizures, etc. ..."

The right to use the mails is of the same nature as the right to carry on business, which the Supreme Court has been desirous to protect against arbitrary deprivations. (Adair v. United States, 208 U.S. 161 (1908) 52 L. Ed. 436. Coppage v. Kansas, 236 U.S. 1 (1915), 59 L. Ed. 441. Adams v. Tanner, 244 U.S. 590 (1917), 61 L. Ed. 1336. Allgeyer v. Louisiana, 165 U.S. 578 (1897), 41 L. Ed. 832.) The right which Congress has granted to all properly circumstanced persons to use the mails is a substantial right, (Hoover v. McChesny, 81 Fed. 472.) and independent of the discretion of the Postmaster General. That right, and the conditions upon which it may be exercised are defined and rest wholly upon mandatory legislation of Congress. United States v. Burleson, 255 U.S. 407, 65 L. Ed. 704). The right, however, is subject to the power to police the mails as an incident of the postal power. Thus Congress may exclude from the mails matter which is dangerous or which carries on its face immoral expressions, threats, or libels. It may go further, and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are entirely unrelated to the business of transporting mails. (In re Rapier, supra; Lewis Publishing Co. v. Morgan, 229 U.S. 288, 57 L. Ed. 1190 (1913).

Nevertheless, the postal power, like all the other powers of Congress is subject to the limitations and the prohibitions placed by the Fifth Amendment to the Constitution upon the Exercise of the enumerated

powers of Congress. (Burton v. United States, 202 U.S. 344, 371 (1906), 50 L. Ed. 1057, 1067.)

In Ex Parte Jackson, supra, the constitutional power of Congress to exclude lottery tickets from the mails was questioned. The court held that the postal power extended to the right to determine what should be carried, its classification, weight, form and charges to be made and that the right to designate what shall be carried necessarily involved the right to determine what shall be excluded. This it did in the following language at page 732:

> "...The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned. What should be mailable has varied at different times, changing with the facility of transportation over the post-roads. At one time, only letters, newspapers, magazines, pamphlets, and other printed matter, not exceeding eight ounces in weight, were carried; afterwards books were added to the list; and now small packages of merchandise, not exceeding a prescribed weight, as well as books and printed matter of all kinds, are transported in the mail. The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. ..."

The court then pointed out that the difficulty attending the subject arose not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of mail.

The first of these rights considered was the constitutional guaranty of the Fourth Amendment against unreasonable searches and seizures. The court in disposing of objections based on this ground said at pp. 732, 733:

> "... In their enforcement, a distinction is to be made between different kinds of mail matter,--between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly

describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

pp. 735, 736:

"Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters or packages, or from agents depositing them in the post-office, or others cognizant of the facts. And as to objectionable printed matter, which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts, and, in some cases, by the direct action of the officers of the postal service. In many instances, those officers can act upon their own inspection, and, from the nature of the case, must act without other proof; as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases, no difficulty arises, and no principle is violated, in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by every one, and is in its nature conclusive."

The court next considered objections based on the constitutional guaranty of the First Amendment which prohibits the enactment of laws abridging the freedom of speech or of the press. In disposing of them the court said at pp. 733, 736:

"Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

* * *

"In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. ..."

* * *

"All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries, --institutions which are supposed to have a demoralizing influence upon the people. ..."

In the course of its decision it reviewed certain historical aspects of the view that the power did not extend to the exclusion of publications from the use of the mails because such would be an abridgement of the liberty of the press. This review (found at pp. 733 to 735) is as follows:

"In 1836, the question as to the power of Congress to exclude publications from the mail was discussed in the Senate; and the prevailing opinion of its members, as expressed in debate, was against the existence of the power. President Jackson, in his annual message of the previous year, had referred to the attempted circulation through the mail of inflammatory appeals, addressed to the passions of the slaves, in prints, and in various publications, tending to stimulate them to insurrection; and suggested to Congress the propriety of passing a law prohibiting, under severe penalties, such circulation of 'incendiary publications' in the Southern States. In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject; in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation. Whilst, therefor, condemning in the strongest terms the circulation of the publications, he insisted that Congress had not the power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the liberty of the press. 'To understand,' he said, 'more fully the extent of the control which the right of prohibiting circulation through the mail would give to the government over the press, it must be borne in mind that the power of Congress over the post-office and the mail is an exclusive ..." power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable

water to be a post-road; and that, by the act of 1825, it is provided "that no stage, or other vehicle which regularly performs trips on a post-road, or on a road parallel to it, shall carry letters." The same provision extends to packets, boats, or other vessels on navigable waters. Like provision may be extended to newspapers and pamphlets, which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties.' Mr. Calhoun, at the same time, contended that when a State had pronounced certain publications to be dangerous to its peace, and prohibited their circulation, it was the duty of Congress to respect its law and cooperate in their enforcement; and whilst, therefore, Congress could not prohibit the transmission of the incendiary documents through the mails, it would prevent their delivery by the postmasters in the States where their circulation was forbidden. In the discussion upon the bill reported by him, similar views against the power of Congress were expressed by other senators, who did not concur in the opinion that the delivery of papers could be prevented when their transmission was permitted."

The court then proceeded to state that the views of these distinguished jurists and statesmen were founded on the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than mail, but that in the opinion of the court Congress did not possess the power to prevent the transportation in other ways of merchandise or matter which it excluded from the mails.

In the case of Ex Parte Rapier, 143 U. S. 110, 36 L. Ed. 93, the power of Congress to forbid the use of mails to lottery tickets, circulars, and certain other matter was again challenged. The contention was made that where Congress could not by direct legislation pronounce a business to be a crime and punish it as such it was not competent for Congress to deprive it of the benefit of the mails for the sole purpose of endeavoring to harass or obstruct or suppress it. While the Tenth Amendment was not cited by name, considerable stress was laid on the point that the suppression of lotteries by the denial of the use of the mails was utterly inconsistent with the whole theory of the constitutional relations between the general government and the states. This same argument is being urged against the validity of the use of power to exclude from the mails which is made in recent New Deal legislation such as the Public Utility Act of 1935 and the Securities Act of 1933, hereinafter considered in detail under point V of this opinion.

Without specific reference to the Tenth Amendment, the court sustained the power of Congress to forbid the use of the mails to articles of this character in the following language at p. 134:

"... It is not necessary that Congress should have the power to deal

with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

"The argument that there is a distinction between mala prohibita and mala in se, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as mala in se, including all such crimes as murder, arson, burglary, etc., and the offence of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses."

Specifically referring to the freedom of the press objection, the court said at pp.134 and 135:

"We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."

In Lewis Publishing Co. v. Morgan, supra, the freedom of press objection was urged against the denial of the privileges of second class mail matter including low postal rates to newspaper and periodicals which did not publish sworn statements of their average circulation, the names of their editors, publishers, owners, principal stockholders, principal creditors, and other specified data, and mark all paid reading matter as "advertisement". The Supreme Court examined carefully the power of Congress to classify mail under its general power to establish and operate a postal system, and declared the requirements in question to be reasonable in character and constitutional. In its decision the court used the following language, p.313, 314:

"... That Congress in exerting its power concerning the mails has the comprehensive right to classify which it has exerted from the beginning and therefore may exercise its discretion for the purpose of furthering the public welfare as it understands it, we think it too clear for anything but statement; the exertion of power of

course, at all times and under all conditions being subject to the express or necessarily implied limitations of the Constitution. From this it results that it was and is in the power of Congress in 'the interest of the dissemination of current intelligence' to so legislate as to the mails, by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers... This being true, the attack on the provision in question as a violation of the Constitution because infringing the freedom of the press, and depriving of property without due process of law, rests only upon the illegality of the conditions which the provision exacts in return for the right to enjoy the privileges and advantages of the second-class mail classification"

In United States v. Burleson, supra, the question of the freedom of the press was also involved. The Supreme Court upheld an order which suspended the second class mail privilege of a newspaper publishing company which had in violation of the Espionage Act of June 15, 1917 (40 Stat. at Large 230) published systematically false reports and statements intended to interfere with the success of military operations of the United States and to obstruct its recruiting and enlistment service. The exclusion from the mails was held to be applicable to all issues of the newspaper until such time as it should be shown that the newspaper was no longer publishing such false reports and statements.

Numerous prohibitions against use of the mails imposed by Congress have either been upheld specifically by the Supreme Court, or their constitutionality has not been under attack. Among the statutes enacted by Congress prohibiting the use of the mails by certain specified matter, are laws excluding from the mails obscene matter and information concerning abortion, (U. S. Criminal Code, Section 211; obscene, libelous or threatening matter upon envelopes or postal cards, U.S. Criminal Code, Section 212; matters relative to schemes to defraud, U.S. Criminal Code, Section 215; poisons, insects, reptiles, explosives, intoxicating liquors, U. S. Criminal Code, Section 217; matter of a character to incite arson, murder or assassination, Act of March 4, 1911, Chap. 241, Section 2 (36 Stat. at L. 1339); matter violating copyright laws, Act of March 3, 1879, Chap.180, Sec.15. (20 Stat. at L.359); prize fight films, Act of July 31, 1912, Chap. 263, Sec. 1, (37 Stat. at L. 240); advertisements and solicitations for orders for intoxicating liquors in prohibition states, Act of March 3, 1917, Chap. 162, Section 5, (39 Stat. at L. 1069).

The Supreme Court in Badders v. United States, 240 U. S. 391 (1916), 60 L. Ed. 706 decided that the provisions of Section 215 of the Un. S. Criminal Code prohibiting the placing of letters in the mail for the purpose of executing a scheme to defraud is within the power of Congress, even as applied to what may be a mere incident of a fraudulent scheme that is outside the jurisdiction of Congress. This case is cited in Jones v. Securities and Exchange Commission, infra, to sustain the use of the postal power in the Securities Act of 1933 to exclude from the mails unregistered securities.

The constitutionality of the Espionage Act was upheld by the Supreme Court in Schenck v. United States, supra.

The Trading with the Enemy Act passed on October 6, 1917 by Congress, Chap. 106, Sec. 19, 40 Stat. at L. 425, provided that until the end of the War foreign language papers should be non-mailable unless a translation should have been previously filed with the local postmaster; but that Postmaster General might, in his discretion, grant a permit to mail without such translation; such provisions to be applicable to publications sent by any class of mails. Its constitutionality was not subsubjected to attack.

The Act prohibiting the use of the mails by prize fight films was never attacked in the Courts and remains in effect; although the Supreme Court in Weber v. Freed, 239 U. S. 325 (1915), 60 L. Ed. 308, held to be constitutional that portion of the Act prohibiting importation in foreign commerce of such fight films.

By the Act of February 8, 1927 (29 Stat. at L. 512, U. S. Criminal Code, Sec. 245) Congress forbade the depositing or carrying in the mails of "any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character, etc." The Supreme Court has not passed squarely upon the constitutionality of this law; but in United States v. Popper, 98 Fed. 423 (1899), the District Court for the Northern District of California upheld the law; and this decision was cited with approval by the Supreme Court in Hoke v. United States, 227 U. S. 308 (1913), 57 L. Ed. 523, in which the validity of the Mann Act (36 Stat. at L. 825) was sustained.

The case of Champion v. Ames, 188 U. S. 321 (1903), 57 L. Ed. 492 upholds the Act of Congress passed on March 2, 1895 (28 Stat. at L. 963), excluding from interstate or foreign commerce "any paper, certificate, or instrument purporting to be or represent a ticket, share or interest in or dependent upon the event of a lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance". This Act also prohibits the depositing in or carriage by the mails of the same matter. The constitutionality of the latter provision of the Act has never been attacked.

The "Reed" or "Bone Dry" amendment to the Post Office Appropriation Act passed by Congress on March 3, 1917 (39 Stat. at L. 1058-1069) provided that no letter, postal card, circular, newspaper, pamphlet or publication of any kind containing any advertisement or spiritous, vinous, malted, fermented, or other intoxicating liquors should be deposited in or carried by the mails of the United States, or delivered by any postmaster or letter carrier when addressed to any person, or corporation, or other addressee at any place in any state or territory of the United States or the District of Columbia, "at which it is by the law in force in the State or Territory at the time unlawful to advise or solicit orders for such liquors, or any of them respectively". The constitutionality of this Act, insofar as it prohibits the use of the mails, has remained undisturbed by attack. However, its provisions prohibiting transportation in interstate or foreign commerce have been upheld by the Supreme Court in United States v. Hill, 248 U. S. 420 (1919), 63 L. Ed. 337.

By Section 2 of the Act of May 16, 1918, Chap. 75, 40 Stat. at L. 554, authority was conferred upon the Postmaster General to stop delivery of mail to a person whom he finds "upon evidence satisfactory to him" to be using the mails in violation of the Espionage Act.

The power of the Federal Government to refuse the mails to objectionable matter attends that matter at every step from its first deposit in the mail until its final delivery to the addressee. Public Clearing House v. Coyne, 194 U. S. 497 (1904), 48 L. Ed. 1092.

By sections 6 of the Act of June 8, 1872 (17 Stat. at L. 285, Chap. 335), the Postmaster General was empowered to "superintend the business of the Department, and to execute laws relative to the postal service". The Postmaster General, acting through his subordinates rejects matter offered for mailing, or removes matter already in the mail, which, in his judgment, is unmailable. The power of the Postmaster General to do this within the limits of the principles enunciated in the various cases already cited can not be doubted.

To sum up, while the postal power is planary, extending to the classification and exclusion of articles presented for transmission through the mails, it is not without limitations. They are:

First: Freedom of the press, guaranteed by the First Amendment to the Federal Constitution.

Second: Security from unreasonable search and seizures, pursuant to the Fourth Amendment to that Constitution.

Third: Due process, required by the Fifth Amendment to that Constitution.

In connection with freedom of the press, and the limitation imposed by the First Amendment, there appears to be no doubt that if there should be a real interference with freedom of the press, the Supreme Court would decline to grant its approval. The decisions of that Court lead to no conclusion other than that any attempt on the part of Congress to place a serious restraint upon the press, or even to deny the press postal facilities, would receive a judicial veto.

All exclusions from the mails actually upheld by the Supreme Court can be justified as partaking of the nature of Federal police regulations. The excluded articles are either inherently injurious, inimical to the health, safety and well-being of the recipients, or the use of the mails has been denied because such use would be in furtherance of a design that is condemned by moral considerations, or is against public policy.

If legislation to regulate hours and wages of industries should simply make matter relating to unapproved hours and wages non-mailable and should penalize any attempt to use the postal service for its carriage, such legislation would probably be less objectionable. But it seems clear that if legislation should grant the Postmaster General absolute authority to deny delinquent industries mail facilities for all of its mail matter, much of which would be admittedly innocuous, the result would be, in effect, to empower the Postmaster General to mete out punishment for acts not make criminal by Congress. Such legislation would be unconstitutional. This appears very clearly from the principle of the cases already cited and those which follow.

If industries violate a constitutional law that may be enacted by Congress relating to hours and wages, or their hours and wages have been otherwise out-lawed by valid legislation, Congress would have the right to deny them the use of the mails, since it would be anomalous for the Federal Government to aid, through its instrumentalities such as the postal service, persons or corporations violating valid laws.

The Federal Child Labor Act of September 1, 1916 (39 Stat. at L. 675) was declared unconstitutional by the Supreme Court as to interstate commerce in Hammer v. Dagenhart, supra, as not being a regulation of Clause of the Federal Constitution; but, on the contrary, as being a regulation of production or manufacture within the exclusive right of the states to regulate. It is logical to assume that the same line of reasoning would be applied by the Supreme Court to any federal legislation regulating industry hours and wages containing provisions excluding communications and parcels of industries that are in violation of such legislation where such regulation had no other constitutional sanction.

The Supreme Court has held that Congress, in the exercise of an acknowledged power, may reach indirectly a result which it is not constitutionally authorized to reach directly; and the desire to reach this indirect result which may have furnished the real motive for its action is not a matter into which the courts can constitutionally inquire. (Champion v. Ames, 188 U. S. 321 (1903), 47 L. Ed. 492; McCray v. United States, 195 U. S. 27 (1904), 49 L. Ed. 78;; Veazie Bank v. Fenno, 8 Wall. 533 (1869); Hipolite Egg Co. v. United States, 222 U. S. 245 (1911), 55 L. Ed. 520; Caminetti v. United States, 242 U. S. 370 (1917), 61 L. Ed. 371; Clark Distilling Co. v. Western Maryland Railroad, 243 U. S. 311 (1917), 61 L. Ed. 741).

Thus, Congress may exercise a right of exclusion of matter from the mails, when to do so constitutes a necessary and reasonable means of rendering effective a policy which, in itself, is one which Congress has the constitutional right to enforce even though the indirect results thereof are to influence matters within the regulatory powers of thestates. If, therefore, the Supreme Court should find an act passed by Congress regulating hours and wages of industries to be constitutional under the Commerce Clause, a provision in such an act excluding matter of delinquent industries from the mails would be lawful even though the matter was not inherently dangerous to carry or of such a character as to do any injury, moral or physical, to anyone. But any federal legislation excluding matters from the mails must apply directly to the things mailed, not to the persons using the mails. This seems clear from the general principles already enumerated, and from the case of Jones v. Securities & Exchange Commission, infra, and American States Public Service Co., Debtor in re, infra.

However, Congress under the guise of an exercise of its postal power, may not regulate matters not otherwise within its powers to regulate. Such an extension of the postal power might result in the subjection of practically all local activities in the country to regulation by Congress, since business cannot be conducted without use of the mails. Little would then remain of state rights and powers. As Walter F. Dodd in "Adjustments of the Constitution to New Needs (A. B.A. Journal, February, 1936, at page 128), says:

"The power 'to establish post offices and post roads', if construed to permit the denial of postal facilities with respect to local transactions not otherwise within the power of the national government, may of itself alone bring an abandonment of the constitutional principle that the federal government has limited powers."

IV. Other aspects of the Power.

The case of In re Debs, 158 U. S. 564, 39 L. Ed. 1092 (1895) involved the issue whether, for protection of the mails and of interstate commerce, the Federal Government, may by the use of judicial restraining orders or the employment of its armed forces, if necessary, prevent interference with the mails and with interstate commerce. The Supreme Court decided the issue in the affirmative, even in the absence of Federal legislation on the subject. It said at page 582:

> "... The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails...."

The same fullness of control as exists over railroads declared by statute to be post roads exists over waterways, and the Federal Government has the same power to remove obstructions from the one as from th other. (In re Debs, supra.)

This control extends to the granting of franchises authorizing corporations to construct national highways and bridges from state to state, (California v. Central Pacific Railroad Co., supra; Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. 421, 15 L. Ed. 435 (1856); Luxton v. North River Bridge Co., 153 U. S. 529, 38 L. Ed. 808 (1894), and to grants of rights of way through states, immunity from taxation, powers of eminent domain, and the right to resort to federal courts on the ground of federal citizenship. "There can be no doubt as to the right of the federal government to construct highways for the transportation of the mail and to charge tolls for their use; also to own and operate carriers, and, inincidentally, to engage in business of a private nature if this insures the efficiency of the Governmental agency." The Postal Power of Congress (1916)--Lindsay Rogers.

It is self-evident that the regulatory power of Congress over post offices and post roads is enlarged because of the designation of railroads, water lines and highways as post roads and the utilization of railroad cars, boats, trucks and busses, operated over such post roads, as federal post offices within the confines of a state.

The federal control of post roads, as the Debs Case, 158 U. S. 564 (1895), made clear, is not confined to mere legislative rules enforceable in the courts; but extends to the removal of obstructions to the carriage of the mails and the executive power. The National Government is charged "with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."

Moreover, the Federal Government, under its right of eminent domain, upon the payment of adequate compensation, judicially determined, may compel postal service from railroads. This may be done either by assuming management of them for such a purpose, or by enforcing criminal provisions against obstructing or delaying the mails. (43rd Congress, Ist Session, Senate Report No. 478).

The discussion by Willoughby (op. cit. page 1114-15) of the general question of how much control a state may exercise over the recipient of mail matter and over federal postal agents should be noted. Thus he states:

> "...This question at one time gave rise to extended discussion in connection with the laws of certain of the States prohibiting the possession or distribution of writings or publications which those States deemed incendiary or otherwise pernicious. This controversy did not reach the courts, but it led to the rendition of an interesting opinion by Cushing, Attorney General of the United States, and also one by John Randolph Tucker, Attorney General of the State of Virginia. In Mr. Tucker's memorandum or opinion he stated the proposition that the Federal power over the mails ceased when the mail matter reached the point of reception, and that then the State authority began and was exclusive, with the result that each State might determine whether the mailed matter should be delivered to the persons in the State to whom it was addressed, and that a postmaster violating State laws as to this could not plead a justification derived from the Federal Constitution or Federal laws. This doctrine was approved by Postmaster General Holt. It would seem clear, however, that this doctrine was not a sound one, since the delivery of mail matter to the addressee is obviously an integral part of Federal postal service, and, as such, could not, constitutionally, be directly interfered with any under State authority. The fact that the doctrine should have been declared and should have met with any acceptance is explainable, as Professor Rogers points out, only by the fact that, at the time it was declared, the absolute supremacy of Federal over State authority had not been so clearly stated and enforced as it later came to be.
> "However, though it is clear that a State may not constitutionally forbid or punish the receiving by persons in the State of mail matter the transmission of which is legal under Federal law, it is possible to argue that the States may forbid and penalize the possession by the individual of such matter, which, because of its intrinsic character, the State may reasonably judge to be prejudicial to the peace, safety, or welfare of its citizens or of itself. Professor Rogers seems to think that such a position is a valid one, but the present writer is of opinion that should the question reach the Supreme Court, that tribunal would hold that the Federal right to receive would be unconstitutionally impaired or denied should a State attempt to declare that, unless the receiver of the mail matter should, immediately after receipt thereof, dispossess himself of the matter, he might be held criminally liable. It is the belief of the writer that the States may constitutionally, so far as the Federal postal power is concerned, prohibit the receiver of mail matter from transferring it to other persons, or transporting it, or making other

objectionable use of it, but that this is as far as State authority should be construed to extend." By analogy, considerable light is thrown upon this point by the attitude of the courts towards the receipt of intoxicating liquors brought into the State in interstate commerce.

"Although a State may not penalize or otherwise interfere with the exercise or enjoyment of postal rights, because these are Federal in character, it is reasonably clear that a person accused of a violation of a valid State criminal law cannot secure immunity upon the ground that the means, or one of the means, whereby the act charged against him was committed, was the use of the United States mails. Thus, in a case in which the defendant was charged with soliciting orders for intoxicating liquors in violation of the law of the State, the Federal Circuit Court of Appeals said: 'It makes no difference that the United States mail was used for the solicitation. The Federal Government does not protect those who use its mails to thwart the police regulations of a State made for the conservation of the welfare of its citizens. The use of the mails is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses.'"

Attention is also directed to the following cases upholding various protective measures:

Houston v. Moore, 5 Wheat. 1, 5 L. Ed. 19 (1820);
United States v. Kirby, 7 Wall. 482, 74 U.S. 278 (1868):
(The offense of robbing the mails may be made punishable under federal law enacted by Congress);
Considine v. United States, 112 Fed. 342 (Cir. Ct., Ohio 1901):
(Section 5478 of United States Revised Statutes held constitutional. It provides that "any person who shall forcibly break into or attempt to break into any post office or any building used, in whole or in part, as a post office with intent to commit therein larceny or other depredation", shall be guilty and punishable by the Federal Government);
United States v. McCready, 11 Fed. 225 (Cir. Ct., Tenn., 1882):
(Congress has the power to make it a federal criminal offense for anyone to open a letter even after it has passed from the actual control of the post office officials and agents and before manual delivery to the person to whom it was directed);
Illinois Central Railroad v. Illinois, 163 U.S. 142, 41 L. Ed. 107 (1896): (A state statute providing that all regular passenger trains shall stop at stations and requiring a fast mail train to turn aside from the direct interstate route and to run to a station at Cairo, Illinois and back again in order to receive and discharge passengers at that station is an unconstitutional obstruction of the mails).

V. The Use of the Postal Power in New Deal Legislation.

The new deal legislators have made use of the postal power in several of the important regulatory statutes recently enacted. Thus, Section 5 of the Securities Act of 1933 (15 U.S.C.A. 77e) provides that unless a registration certificate is in effect as to a security it shall be unlawful for a person to make use of any means of transportation or communication in interstate commerce, or of the mails, to sell or offer to buy an unregistered security through the use of any prospectus or otherwise, or to carry or cause to be carried by these means any such security for the purpose of sale or for delivery after sale, or a registered security unaccompanied by a prospectus meeting certain requirements.

The Public Utility Holding Company Act of 1935 provides in Section 4 that unless a holding company (as defined in the Act) is registered with the Securities and Exchange Commission, it shall be unlawful for such company to use the mails or any instrumentality of interstate commerce to negotiate, enter into, take any step in the performance of any service, sales or construction contract, sell goods to any public utility or holding company, to distribute or make any public offering for sale or exchange of any security of such holding company, or subsidiary or affiliate company, to sell any such security, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public utility company or any holding company. Section 6 of the Act contains further exclusions from the use of the mail for the issuance and sale of securities applicable here to registered holding companies or subsidiaries.

In Jones v. Securities and Exchange Commission, 79 F. (2d) 617 (1935), the Circuit Court of Appeals for the second circuit upheld Section 5 of the Securities Act of 1933. (15 U.S.C.A. 77e). In so doing the court said at pages 619, 620:

"The appelant contends that the Securities Act of 1933 as amended is unconstitutional because the securities are not subjects of commerce. But the power of Congress as it relates to control over the use of the mails is fully sustained by the cases which have considered the mail fraud statutes. Badders v. U.S., 240 U.S. 391, 36 S. Ct. 367, 60 L.Ed. 706; Public Clearing House v. Coyne, 194 U.S. 497, 24 S. Ct. 789, 48 L. Ed. 1092; In re Rapier, 143 U.S. 110, 12 S. Ct. 374, 36 L. Ed. 93; Ex parte Jackson, 96 U.S. 727, 24 L. Ed. 877. It is not an unreasoable method of preventing the use of the mails to promote and consummate the sales of misrepresented securities, to require that all securities, before mails are used, must be registered. Lewis Publishing Co. v. Morgan, 229 U.S. 288, 33 S. Ct. 867, 57 L.Ed. upheld the exaction of certain information as a condition precedent to a newspaper's classification as second-class matter. Congress already had the power to enact the provision excluding securities from the use of the mails unless a true statement describing them was filed in a public office in Washington. The postal power, like all other powers of Congress, is subject to the limitations imposed by the Bill of Rights. United States ex rel Milwaukee S.D. Pub. Co. v. Burleson, 255 U.S. 407, 430, 41 S. Ct. 352, 65 L.Ed. 704; Burton v. United States, 202 U.S. 344, 371, 26 S. Ct.

688, 50 L.Ed. 1057, 6 Ann. Cas. 362. But admitting such limitation, we think there was sufficient authority for the mail sections of the Securities Act. The claim that the registration requirements violated due process of law is without force. Registration of all securities, whether good or bad, required by State blue sky laws have been upheld as no violation of the due process clause. Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S. Ct. 217, 61 L.Ed. 480, L.R.A. 1917 F. 514, Ann. Cas. 1917 C. 643; Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 37 S. Ct. 224, 61 L.Ed. 493, Merrick v. N.W. Halsey & Co., 242 U.S. 568, 37 S. Ct. 227, 61 L.Ed. 498. Similar registration required of securities within the jurisdiction by the federal government would likewise be clear of the inhibitions of due process in the Fifth Amendment. If the act is constitutional so far as it forbids the use of the mails, that is sufficient for our present consideration. Section 26 of the act (15 U.S.C.A. 77z) contains a provision that the invalidity of one part shall not invalidate the rest."

The attempted exercise of the postal power in the Public Utility Act of 1935 was declared an excess of constitutional power in American States Public Service Co., Debtor in re., D.C.D.Md., decided November 7, 1935, by District Judge Coleman. The court pointed out the fact that in the cases in which Congress had been held empowered to prohibit the movement of persons and things in interstate commerce "the exclusion was addressed directly to the transportation of harmful persons or things" and that "the laws that were upheld in each of these cases did not provide that the shipper of the harmful thing should be denied the right to use the facilities of commerce, except for the harmful purpose. The exclusion imposed by the Public Utility Act is vastly broader and bears no relation necessarily to the use itself but to the user."

In holding the act unconstitutional as a denial of due process and an invasion of the rights of the states, the court said:

"The Public Utility Act, however, denies the right to use the mails to all companies or individuals that fall within its classifications when they fail to comply with any of the multifarious requirements of the act, not as we have seen, with respect merely to matter, the transmission of which through the mails shall first have been found to be contrary to the public interest, but it excludes communications of every kind whatsoever indulged in by these companies or individuals, without regard to the character of such communications, other than that they shall relate to the business of these companies or individuals, on the theory that they are affected with a national public interest. . . . the decisions of the Supreme Court very definitely support the conclusion here reached, to wit, that the exclusion must rest directly upon a regulation of the mails, that is of the use of the mails, - of the thing mailed, - and not upon a regulation of the user . . . Congress by the Public Utility Act seeks to close absolutely the use of the mails to a certain class of corporations and individuals if they refuse to comply with conditions which Congress has no power directly to impose, aiming by such exclusion to regulate certain practices of these corporations and individuals declared to be

objectionable, although such practices are dissociated from much, if not indeed, the greater portion of the matter thus excluded and itself completely innocuous."

The foregoing cases etch out line by line the limits of the constitutional power of Congress to establish post offices and post roads. While the question of whether Congress may, in the exercise of this power, exclude any and all matter from the mails even though harmless in character, or may prohibit or condition the use of the post roads as a means primarily of controlling not the matter of the use of the roads themselves, but the persons using the mails or roads in their activities not connected with the use of the mails or roads (such as general compliance with N.R.A., standards, minimum wage and maximum hour provisions, etc.) appears never to have been presented to the Supreme Court for decision, nevertheless the unconstitutionality of any legislation addressed to this end seems clear. Maximum hour and minimum wage legislation within the limits of Wilson v. New, 243 U.S. 332, would probably be constitutional but of little practical value.

A general summary of the principles enunciated by the decisions may be made as follows:

1. The post office and post roads clause delegates plenary power to Congress which, however, is subject to the constitutional limitations imposed upon the exercise by Congress of its enumerated powers, particularly, the freedom of the press guaranteed by the First Amendment, the security from unreasonable search and seizure guaranteed by the Fourth Amendment and the due process required by the Fifth Amendment.

2. Congress may not indirectly under the guise of the postal and post road power interfere with constitutional guarantees or the rights reserved to the states by the Tenth Amendment or regulate matters not otherwise within its powers where such interference or regulation would be prohibited if attempted directly.

3. An exclusion from the use of the mails or post roads must rest upon a regulation of the mails or roads and not upon a regulation of the user and is proper only when it is a necessary and reasonable means of rendering effective a policy which Congress has the constitutional right to enforce.

OFFICE OF THE NATIONAL RECOVERY ADMINISTRATION
THE DIVISION OF REVIEW

THE WORK OF THE DIVISION OF REVIEW

Executive Order No. 7075, dated June 15, 1935, established the Division of Review of the National Recovery Administration. The pertinent part of the Executive Order reads thus:

> The Division of Review shall assemble, analyze, and report upon the statistical information and records of experience of the operations of the various trades and industries heretofore subject to codes of fair competition, shall study the effects of such codes upon trade, industrial and labor conditions in general, and other related matters, shall make available for the protection and promotion of the public interest an adequate review of the effects of the Administration of Title I of the National Industrial Recovery Act, and the principles and policies put into effect thereunder, and shall otherwise aid the President in carrying out his functions under the said Title. I hereby appoint Leon C. Marshall, Director of the Division of Review.

The study sections set up in the Division of Review covered these areas: industry studies, foreign trade studies, labor studies, trade practice studies, statistical studies, legal studies, administration studies, miscellaneous studies, and the writing of code histories. The materials which were produced by these sections are indicated below.

Except for the Code Histories, all items mentioned below are scheduled to be in mimeographed form by April 1, 1936.

THE CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain the definition of the industry and the principal products thereof; the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operation of the code authority, the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code; and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, but also in terms of the experiences of the deputies and others concerned with code formation and administration.

The Code Histories, (including histories of certain NRA units or agencies) are not mimeographed. They are to be turned over to the Department of Commerce in typewritten form. All told, approximately eight hundred and fifty (850) histories will be completed. This number includes all of the approved codes and some of the unapproved codes. (In Work Materials No. 18, Contents of Code Histories, will be found the outline which governed the preparation of Code Histories.)

(In the case of all approved codes and also in the case of some codes not carried to final approval, there are in NRA files further materials on industries. Particularly worthy of mention are the Volumes I, II and III which constitute the material officially submitted to the President in support of the recommendation for approval of each code. These volumes

set forth the origination of the code, the sponsoring group, the evidence advanced to support the proposal, the report of the Division of Research and Planning on the industry, the recommendations of the various Advisory Boards, certain types of official correspondence, the transcript of the formal hearing, and other pertinent matter. There is also much official information relating to amendments, interpretations, exemptions, and other rulings. The materials mentioned in this paragraph were of course not a part of the work of the Division of Review.)

THE WORK MATERIALS SERIES

In the work of the Division of Review a considerable number of studies and compilations of data (other than those noted below in the Evidence Studies Series and the Statistical Material Series) have been made. These are listed below, grouped according to the character of the material. (In Work Materials No. 17, Tentative Outlines and Summaries of Studies in Process, these materials are fully described).

Industry Studies

Automobile Industry, An Economic Survey of
Bituminous Coal Industry under Free Competition and Code Regulation, Economic Survey of
Electrical Manufacturing Industry, The
Fertilizer Industry, The
Fishery Industry and the Fishery Codes
Fishermen and Fishing Craft, Earnings of
Foreign Trade under the National Industrial Recovery Act
  Part A - Competitive Position of the United States in International Trade 1927-29 through 1934.
  Part B - Section 3 (e) of NIRA and its administration.
  Part C - Imports and Importing under NRA Codes.
  Part D - Exports and Exporting under NRA Codes.
Forest Products Industries, Foreign Trade Study of the
Iron and Steel Industry, The
Knitting Industries, The
Leather and Shoe Industries, The
Lumber and Timber Products Industry, Economic Problems of the
Men's Clothing Industry, The
Millinery Industry, The
Motion Picture Industry, The
Migration of Industry, The: The Shift of Twenty-Five Needle Trades From New York State, 1926 to 1934
National Labor Income by Months, 1929-35
Paper Industry, The
Production, Prices, Employment and Payrolls in Industry, Agriculture and Railway Transportation, January 1923, to date
Retail Trades Study, The
Rubber Industry Study, The
Textile Industry in the United Kingdom, France, Germany, Italy, and Japan
Textile Yarns and Fabrics
Tobacco Industry, The
Wholesale Trades Study, The
Women's Neckwear and Scarf Industry, Financial and Labor Data on

Women's Apparel Industry, Some Aspects of the

Trade Practice Studies

Commodities, Information Concerning: A Study of NRA and Related Experiences in Control
Distribution, Manufacturers' Control of: Trade Practice Provisions in Selected NRA Codes
Distributive Relations in the Asbestos Industry
Design Piracy: The Problem and Its Treatment Under NRA Codes
Electrical Mfg. Industry: Price Filing Study
Fertilizer Industry: Price Filing Study
Geographical Price Relations Under Codes of Fair Competition, Control of
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  Part B. Nature, Composition and Organization of Code Authorities

Part C. Activities of the Code Authorities
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Relationship of NRA to Government Contracts and Contracts Involving the Use of Government Funds
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Collective Bargaining Agreements, the Right of Individual Employees to Enforce
Commerce Clause, Federal Regulation of the Employer-Employee Relationship Under the
Delegation of Power, Certain Phases of the Principle of, with Reference to Federal Industrial Regulatory Legislation
Enforcement, Extra-Judicial Methods of
Federal Regulation through the Joint Employment of the Power of Taxation and the Spending Power
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Intrastate Activities Which so Affect Interstate Commerce as to Bring them Under the Commerce Clause, Cases on
Legislative Possibilities of the State Constitutions
Post Office and Post Road Power -- Can it be Used as a Means of Federal Industrial Regulation?
State Recovery Legislation in Aid of Federal Recovery Legislation History and Analysis
Tariff Rates to Secure Proper Standards of Wages and Hours, the Possibility of Variation in
Trade Practices and the Anti-Trust Laws
Treaty Making Power of the United States
War Power, Can it be Used as a Means of Federal Regulation of Child Labor?

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THE EVIDENCE STUDIES SERIES

The Evidence Studies were originally undertaken to gather material for pending court cases. After the Schechter decision the project was continued in order to assemble data for use in connection with the studies of the Division of Review. The data are particularly concerned with the nature, size and operations of the industry; and with the relation of the industry to interstate commerce. The industries covered by the Evidence Studies account for more than one-half of the total number of workers under codes. The list of these studies follows:

Automobile Manufacturing Industry
Automotive Parts and Equipment Industry
Baking Industry
Boot and Shoe Manufacturing Industry
Bottled Soft Drink Industry
Builders' Supplies Industry
Canning Industry
Chemical Manufacturing Industry
Cigar Manufacturing Industry
Coat and Suit Industry
Construction Industry
Cotton Garment Industry
Dress Manufacturing Industry
Electrical Contracting Industry
Electrical Manufacturing Industry
Fabricated Metal Products Mfg. and Metal Finishing and Metal Coating Industry
Fishery Industry
Furniture Manufacturing Industry
General Contractors Industry
Graphic Arts Industry
Gray Iron Foundry Industry
Hosiery Industry
Infant's and Children's Wear Industry
Iron and Steel Industry
Leather Industry
Lumber and Timber Products Industry
Mason Contractors Industry
Men's Clothing Industry
Motion Picture Industry
Motor Vehicle Retailing Trade
Needlework Industry of Puerto Rico
Painting and Paperhanging Industry
Photo Engraving Industry
Plumbing Contracting Industry
Retail Lumber Industry
Retail Trade Industry
Retail Tire and Battery Trade Industry
Rubber Manufacturing Industry
Rubber Tire Manufacturing Industry
Shipbuilding Industry
Silk Textile Industry
Structural Clay Products Industry
Throwing Industry
Trucking Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Wholesale Fresh Fruit and Vegetable Industry
Wool Textile Industry

THE STATISTICAL MATERIALS SERIES

This series is supplementary to the Evidence Studies Series. The reports include data on establishments, firms, employment, payrolls, wages, hours, production capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data, the technical methods employed, and the applicability of the material to the study of the industries concerned. The following numbers appear in the series:
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Asphalt Shingle and Roofing Industry
Business Furniture
Candy Manufacturing Industry
Carpet and Rug Industry
Cement Industry
Cleaning and Dyeing Trade
Coffee Industry
Copper and Brass Mill Products Industry
Cotton Textile Industry
Electrical Manufacturing Industry
Fertilizer Industry
Funeral Supply Industry
Glass Container Industry
Ice Manufacturing Industry
Knitted Outerwear Industry
Paint, Varnish, and Lacquer, Mfg. Industry
Plumbing Fixtures Industry
Rayon and Synthetic Yarn Producing Industry
Salt Producing Industry

THE COVERAGE

The original, and approved, plan of the Division of Review contemplated resources sufficient (a) to prepare some 1200 histories of codes and NRA units or agencies, (b) to consolidate and index the NRA files containing some 40,000,000 pieces, (c) to engage in extensive field work, (d) to secure much aid from established statistical agencies of government, (e) to assemble a considerable number of experts in various fields, (f) to conduct approximately 25% more studies than are listed above, and (g) to prepare a comprehensive summary report.

Because of reductions made in personnel and in use of outside experts, limitation of access to field work and research agencies, and lack of jurisdiction over files, the projected plan was necessarily curtailed. The most serious curtailments were the omission of the comprehensive summary report; the dropping of certain studies and the reduction in the coverage of other studies; and the abandonment of the consolidation and indexing of the files. Fortunately, there is reason to hope that the files may yet be cared for under other auspices.

Notwithstanding these limitations, if the files are ultimately consolidated and indexed the exploration of the NRA materials will have been sufficient to make them accessible and highly useful. They constitute the largest and richest single body of information concerning the problems and operations of industry ever assembled in any nation.

L. C. Marshall,
Director, Division of Review.

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